Earthgrains Baking Companies, Inc. *and* Teamsters Union Local No. 490, International Brotherhood of Teamsters, AFL–CIO. Case 32–CA–16153

February 12, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On June 30, 1998, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Earthgrains Baking Companies, Inc., Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Jo Ellen Marcotte, Esq., for the Acting General Counsel.
Allen Teagle, Esq. (Littler, Mendelson), of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on May 6, 1998,[1] at Oakland, California. The charge was filed by the Teamsters Union Local No. 490, International Brotherhood of Teamsters, AFL–CIO (Union or Charging Party) on June 13, against the Earthgrains Baking Companies, Inc. (Respondent). The complaint, as amended, alleges Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act.

Principally, the complaint alleges Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union, on behalf of the joint representative, pricing information concerning certain products which is asserted to be necessary for, and relevant to, the Union's performance of its duties as the exclusive representative of the employees in an appropriate unit.

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent asserts the information sought by the Union is confidential, proprietary, and trade secret pricing information. Respondent also claims the issue is moot, the Union failed to present a genuine need for the information, the matter should be deferred to arbitration, and any violation is "purely technical at best, not warranting issuance of an adverse decision ."

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Based on the Respondent's answer to the complaint, as amended, and the Parties stipulations at hearing, I find Respondent meets one of the Board's jurisdictional standards and the Unions, as Joint Representative, including Local 498, are statutory labor organizations.[3]

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a commercial baker, engaged in baking, marketing, and distributing bread and other bakery products. Respondent and Charging Party have a long-term, collective-bargaining relationship. Prior to 1993, Respondent was part of a multi-employer bargaining group which reached collective-bargaining agreements with a multi-union bargaining group. Since 1993, Respondent has bargained alone with a union committee comprised of 13 Locals.

As indicated in the collective-bargaining agreement, Respondent's products are delivered to retail stores under the route sales system. The driver is also a salesmen who delivers the products, puts up the displays of the products, including stocking the shelf, and rotates the items. These employees also service restaurants. These drivers are paid a weekly base wage plus a range of commissions, as described in greater detail below. The Charging Party represents these route salesmen.

B. Distribution to Southland

In 1995, Respondent, by Jonathan Hearns, its director of human Resources for its Oakland bakery, informed the Union it wished to provide its products to Southland Corporation, which is the parent company of the 7–11 Convenience Store chain. Respondent wished to supply Southland at its central distribution center (CDC) rather than delivering to individual stores. Hearns and William Sawyer, the Union's long-term secretary/treasurer, agreed to a meeting to discuss this proposal. On or about August 8, 1995, Sawyer met with Hearns and Mike George, who was Respondent's zone vice president, the head of the Oakland bakery at that time. The method of distribution and the nature of the product, as explained below, affected the compensation of the route salesmen covered by the collective-bargaining agreement.

At the meeting, Respondent's representatives informed Sawyer of its plans to enter into a direct distribution agreement with Southland. Sawyer responded, ''the Union would view that as a violation of the collective-bargaining agreement, and we would

[1] Member Hurtgen agrees with the judge's conclusion that deferral to arbitration is inappropriate in the circumstances of this case.

[1] All dates are in 1997 unless otherwise indicated.

[2] I specifically discredit any testimony inconsistent with my findings.

[3] Respondent denied certain unions listed in the complaint were collective-bargaining representatives, but did not dispute that all listed unions were a Joint Representative which were signatories to a current collective-bargaining agreement and admitted certain locals were collective-bargaining representatives of its employees in the following appropriate unit:

> All full-time and regular part-time employees performing work described in and covered by "Section 2. Recognition and Bargaining Unit Work" of the October 1, 1993 through September 30, 1996 collective bargaining agreement between the Joint Representative and Respondent (herein called the Agreement); excluding all other employees, guards, and supervisors as defined in the Act.

take what we considered was appropriate action." Sawyer explained his position as follows:

> [T]he route sales system of direct delivery to the stores for the route sales was, with very few exceptions, [the] exclusive method of distribution under the terms of the collective bargaining agreement, and what they were proposing at the time would have violated that agreement, and would have then gone to what was section 18[4] of the contract, Change of Method of Distribution . . . .
>
> I told them—at that first meeting they were talking about distribution of Rainbow product, and we distribute—and Rainbow product is distributed through the route sales system, is a full commission product, and would constitute a change in method of distribution.

As here pertinent, section 11 of the collective-bargaining agreement provides that drivers and salesmen receive, in addition to specified wage scales, 7.25 percent of all net weekly sales per week, which increases to 7.25 percent in 1997, 7.75 percent in 1998, and 8 percent in 1999. The collective-bargaining agreement further provides: "Commissions on private or secondary label bakery products shall be computed and paid on the prevailing wholesale price of the private or secondary bakery product in effect." In addition to specified wages, sales drivers shall receive a commission on secondary and private label sales where there is no rack service: 3.25 percent in 1996, increasing to 3.5 percent in 1997, 3.75 percent in 1998, and 4 percent in 1999. Where there is rack service, the commissions increased 1 percent. Those drivers who exclusively deliver private or secondary label products to a central distribution center are paid the hourly rate of a transport driver.

The Respondent and Union met six more times and successfully negotiated a collective-bargaining agreement executed October 1, 1996, and effective at all times here pertinent. On January 16, Sawyer wrote Schuitemaker and indicated Respondent's plan to distribute to Southland a product or products labeled Old Fashion as a secondary label was improper since historically that has been a primary label on which the 7 -1/4 -percent commission had been paid. Sawyer also advised Respondent in this letter:

> Any attempt to distribute this label at less than the full 7 1/4 percent commission, or to distribute it by any method other than the route sales system would be a violation of the Collective Bargaining Agreement. Any change in the method of distribution of this product would be subject to Section 18 of the Agreement. The Union will of course vigorously protect the integrity of our Collective Bargaining Agreement.

Schuitemaker replied to this letter on February 7, indicating Respondent intended to deliver to Southland's CDC, and the collective-bargaining agreement "provides for CDC deliveries. . . . This matter is not a change in the method of distribution as you allege." On February 20, Sawyer replied to Schuitemaker reiterating the Union's claim the distribution of the Old Fashion label as a secondary label or by a means other than route sales would be a violation of section 18 of the collective-bargaining agreement. Moore responded to Sawyer on March 14, reasserting Respondent's position section 11(C)(4) governs the distribution of its products to Southland CDC not section 18. At this time, Moore acknowledged the Union refused to submit their differences to arbitration and refuses to relinquish its right to economic action under section 18.

C. Request for Information

In late April 1997, Respondent commenced distributing its products to Southland. The products were the Betsy Ross and Natural Health product lines, which were unquestionably traditionally what was called secondary labels. Respondent also performed some baking for 7–11's private label.[5] Respondent agreed the distribution to the Southland CDC of any Old Fashion labeled products was inappropriate since Old Fashion was a premium label.

The term secondary label is not defined in the collective-bargaining agreement. Sawyer testified, without contradiction, the bakeries and the Union agreed to the development of secondary labels which were distributed at lower commission rates by the covered employees to permit the bakeries customers to compete with the large chains such as Safeway and Lucky stores. According to Sawyer:

> the criteria for a secondary label, it has to be a lower priced item, specifically based to provide the customer a method of providing a lower priced product on the shelf to compete against the Luckys and the Safeways of the world. It has to be in a label that does not have brand recognition, and it has to be offered to the company's entire customer base. . . . Pricing, name recognition, being distributed throughout the base, in other words offered to all the customers.

During the negotiations for the current collective-bargaining agreement, Sawyer explained to Respondent's negotiating committee the definition of secondary label, its history and purpose. While Respondent never overtly agreed to Sawyer's statements, including his definitions, it never challenged them. Respondent never explained its silence during the negotiations concerning Sawyer's definition of secondary label. Respondent did not convincingly refute Sawyer's testimony he consistently gave them the

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[4] Sec. 18 of the collective-bargaining agreement entitled "Change in Methods of Distribution," provides:

> In the event the Employer decides to make a change in distribution methods for any of its products which are not provided for under the terms of this agreement, the Employer shall give thirty (30) days' written notice of such intention to the Local Union involved. The Union and the Employer shall thereupon negotiate with respect to the terms and conditions upon which such change shall be introduced, and the contract shall be considered open for that purpose only. No such change may be put into effect until after the expiration of the thirty-day period, and if the parties cannot reach agreement upon the issues in negotiation and the Employer places such change in effect, then the Union shall have the right to strike against the Employer involved in support of its position after the expiration of the thirty (30) day period, and said Employer involved shall have the right to lock out in support of its position. In the event that the issue is not settled and neither the Union nor the Employer exercises its right to strike or lock out within sixty (60) days of the original notice, the Employer's original notice will be deemed withdrawn. Failure of the Employer to give the required thirty (30) days notice prior to putting any change into effect shall give the Union the immediate right to strike. This Section shall not be subject to the grievance procedure or the no-strike, no-lockout provisions of this Agreement.

[5] Sawyer defined the term private label as follows:

> A private label is a label that's owned by a customer, the customer being the store as opposed to the consumer, which is you or I going into a store. Owned by the customer, which a bakery will do contract baking for and package the product under that store's private label.

same definition, history and purpose of secondary label as used in the collective-bargaining agreement.[6]

Respondent, at the instant hearing, disagreed with Sawyer, claiming secondary labels do not have to be lower priced, and what the customers charge for such products is a matter not within its control or purview. It is not disputed by Respondent that the Betsy Ross and Natural Health products were secondary label products. Nor is it disputed Sawyer informed Hearns and George[7] the matter was a section 18 issue. That Respondent informed the Union of the proposed method of distribution and negotiated about which labels should be supplied to Southland's central distribution center, are factors supporting Sawyer's claim. Moreover, Sawyer testified in an open and direct manner and his testimony is credited. Supporting this conclusion is his clear recall of the events here under consideration.

The day Respondent commenced delivering bakery products to Southland, late April 1997, Sawyer purchased a loaf of bread. The purchase price of the bread exceeded the price Southland was charging for Wonder bread, which was not a private or secondary label. This led Sawyer to believe the products Respondent was supplying Southland were not secondary label items because:

> It did not—the product did not meet the criteria of a secondary label, one of which is it has to sell for a lesser price, be marketed for the specific purpose of competing against the larger chains who have the ability to, either through their own bakeries or through purchasing power, to supply a cheap loaf of bread on the market.

Sawyer then contacted the other union signatories to the collective-bargaining agreement and related his concern the products Respondent was supplying Southland were not secondary label items and asked them to check the prices in their areas. Several of the locals replied reporting the products sold by Respondent to Southland were being sold at full retail price. Sawyer then contacted Hearns and informed him Respondent's method of distribution of secondary label products at full price was contrary to the terms of the collective-bargaining agreement because the products did not meet the criteria of secondary label. Sawyer and Respondent's representatives met several times concerning this issue.

Respondent argued that the price it sold the product to customers was not relevant to qualifying for the secondary label designation. I find this argument unpersuasive. Commissions are based on the wholesale price of the product. Moreover, commissions on government business were based on the contract price. Section 11(C)(2) also provides: "Commissions on private or secondary label bakery products shall be computed and paid on the prevailing wholesale price of the private or secondary bakery product in effect." Moreover, it is more probable the parties agreed to lower the commission on secondary label items as part of the effort to permit customers to compete with the large chains such as Safeway and Lucky stores. Thus, the Union had made a colorable claim.

Moreover, Sawyer exhibited a superior knowledge of the history of the secondary label. Section 11 of the collective-bargaining agreement limits distribution to central distribution centers to any private and secondary label items. The testimony of Schuitemaker and Moore on the subject was not demonstrated to be based on personal knowledge or to be persuasive for any other reasons. I find Sawyer was more credible than Schuitemaker and Moore. Schuitemaker did not appear to be forthright and on occasion he appeared to engage in hyperbole. Moore was not shown to have knowledge of the terms of the collective-bargaining agreement, and his mien was not convincing. Moore's testimony at times was contradictory and contained inherent inconsistencies. Thus, where Schuitemaker and Moore disagree with Sawyer, I have credited Sawyer.

The first meeting on the secondary label issue, was held May 20, 1997. Present for Respondent were George Moore, vice president, labor relations, Gary Schuitemaker, zone vice president for sales, and Hearns. Sawyer and three other union representatives[8] also attended the meeting. Sawyer informed Respondent's representatives:

> that the pricing of the product as we had seen it was contrary to the intent and application, historic application, of secondary label in the collective bargaining agreement, and therefore constituted a change in method of distribution.

The notes of the meeting indicate Sawyer said:

> Pricing—Before objecting like to know what pricing is. Last day of negotiations said pricing had to be the same across the board. BR [Betsy Ross] being sold as premium product in 7–11. Wonder was 2.19 a loaf and BR is 2.20. Violation of intent/history of secondary label and definition given to co. in negotiations.[9]

After a heated discussion concerning the nature and extent of the distribution via Southland CDC, Moore said: "In terms of pricing, we are operating on price table 1 who ever we offer it to would be same price." Moore further indicated the products provided to Southland were at the secondary price listing. When Sawyer asked for the price Respondent was selling the product(s) to Southland, Schuitemaker replied, "Same as late bake. Can get back to you and fax you the list." Sawyer indicated if Respondent

[6] Sawyer testified consistently, and repeated his explanation as follows:

> I explained to the company in detail the history and purpose of the secondary label and the elements that must be contained for product to be a secondary label. Included in that was the lower price product sold specifically to compete with their customers, so their customers could compete with the larger chains that had the ability to market their own low priced product, that it had to be offered across the board to all their customers, that it could not have name recognition or be advertised and so forth to develop that recognition. That it was in fact something to satisfy their customers, because their customers were getting beat up in the market place before this came on.
>
> So if a person that wants to go in a[nd] buy the $.69 or $.99 loaf of bread, would have a product available to it. It's probably $1.29 now, but that didn't want to pay $2.28 a loaf.
>
> After I finished my explanation, John Bottali of Local 484 supplemented, repeated some, and supplemented my explanation of it.

No one from Respondent challenged Sawyer's and Bottali's statements at the time they were made up until the current dispute arose of the products distributed to the Southland CDC.

[7] George and Hearns did not appear and testify.

[8] Dennis Davis, John Bottali, and Gil Olivera. Respondent's claim that Sawyer's testimony should be discredited because Botalli, Davis, and Olivera did not testify is found to be without merit.

[9] Sawyer testified, and was not convincingly refuted, that the development and other aspects of the history and of the secondary label demonstrates that pricing was one of the criteria of such products and these criteria have been consistently applied. There has been a Board of Adjustment decision concerning the term involving San Francisco French Bread, but this decision was not placed in evidence. The Board of Adjustment was the first step of the grievance process.

was selling the product to Southland under the secondary pricing scheme then there would be no violation of the collective-bargaining agreement. Sawyer also stated, according to the notes: "We need wholesale price of everything delivered to CDC incl[uding] price of BR [Betsy Ross labeled products] from other [Earthgrains] bakeries."

Sawyer then related the history of the secondary label, how prior to implementing secondary label products the route sales drivers received a 7-percent commission on all sales. The caveat for lowering their commissions was to lower the price of the secondary label products to permit customers to compete with the large food retailers. Sawyer also emphatically stated the work involved was that of route sales drivers and not transport drivers. Respondent agreed to send a copy of price list 1.

In reply, either Schuitemaker or Moore informed Sawyer Respondent had no control over what Southland charged for the product. Sawyer rejoined it was the Union's position the bread was not a secondary product. Sawyer requested Respondent provide the Union:

> the wholesale price list of what they were charging to Southland Corporation, and so we could determine whether this pricing was the result of the franchisee just boosting the price, or Southland Corporation boosting the price to the franchisee, neither which we really had any control over, or whether it was a result of the company pricing the product inconsistent with the pricing of the secondary label product, and thereby trying to circumvent the intent of the collective bargaining agreement.[10]

Schuitemaker replied he did not know if Respondent had the pricing information and later Schuitemaker indicated that he could, and Respondent would, supply the information. The Union received a fax from Respondent which transmitted standard price list 1. The list did not appear to supply the requested information and it did not contain one of the items sold to Southland, the 24 oz. Betsy Ross bread. The list was the wholesale prices of its product line distributed by Southland's route salesmen and did not clearly represent the wholesale prices charged Southland.

Sawyer next called Hearns in June and indicated his doubt the list had validity concerning his request, specifically mentioning he could not find a couple of the products Respondent sold Southland. Hearns said he was not aware of the pricing but would look into the matter and get back to Sawyer. Hearns called back during the first 2-weeks of June and stated he did not have the information and requested more time to investigate. Shortly thereafter, in mid-June, Hearns called Sawyer and admitted the information faxed to the Union was not the prices Respondent charged Southland "but that had been told by their counsel that they didn't have to give it to us." There is no evidence Respondent made a specific claim of confidentiality or other recognized privilege at this time.

Sawyer further recalled:

> A. I said, "Jonathan, we've always got the pricing information, whether it's been on the retail market, or the government bids, or whatever it happens to have been, from all the companies including Earthgrains, and the company's position is not reasonable and doesn't allow us to determine whether you're distributing in a method that is consistent with meaning, and understanding, and historical practices of the collective bargaining agreement."
>
> He [Hearns] stated that, "I'm just the messenger, you'll have to take it up with someone else."

Sawyer again said the Union needed billing statements, invoices or other documentation that would demonstrate the prices Respondent charged Southland on the products it sold as secondary label products. Hearns repeated Respondent's counsel said they did not have to provide the information. There is no claim Hearns denied Sawyer's claim Respondent had previously provided such pricing information to the Union. This silence is another indication of acquiescence.

Sawyer then determined to contact Moore and inform him the requested information had not been supplied, contrary to the May 20 agreement. Moore said he would look into the matter. Several days later, Moore called Sawyer and said Respondent did not feel it had to supply the Union with any additional information. Based on this response, Sawyer contacted the union lawyer and the charge in this proceeding was filed.

Since all of the Union's communications with Respondent were verbal, Sawyer determined to memorialize the request for information in a letter dated June 20. The letter provided:

> During our meeting of May 20, 1997, the Company agreed to provide the Union with pricing information that would verify the actual wholesale price charged to Southland Corporation for various items. . . . As I stated to you during one of out [sic] phone conversations. The wholesale price list supplied to the Union does not verify the price being charged to Southland Corporation. Only copies of the actual billing invoices from Earthgrains Company to Southland will verify that pricing.[11] The Union has serious doubts whether the Company is in compliance with the provisions of the Collective Bargaining Agreement and must have the requested material to fully represent our members and ascertain whether a continuing violation is occurring. . . . Please be advised that the Company is in violation of Section 18 of the Collective Bargaining Agreement.

Schuitemaker replied to Sawyer's letter on June 26, denying any contract violations and admitted "During our May 20, 1997 meeting, you are correct in stating that the Company committed to provide you the wholesale price for the items we deliver to the Southland CDC." Schuitemaker asserted the list provided by fax met this commitment and also attached another wholesale price list with the products supplied to Southland highlighted. Schuitemaker asserted the list was the only pricing information Respondent has ever provided the Union.

The letter further claims:

[10] Sawyer further explained the need for the requested information as follows:

> In—when they started supplying to the central distribution center and the question arose as to whether this was truly a secondary product, priced as a secondary product and distributed for the purpose that secondary product was developed in the contract, that's when the question arose. Prior to that, in the greater Bay Area, Earthgrains had not been regularly been supplying 7–11 stores. There were one, or two, or three that they had, but didn't have most of them, although in the valley areas they were supplying them.

[11] Respondent on brief claims it has no invoices because Southland is billed electronically and thus it cannot comply with the request. I find this argument unpersuasive. There was no evidence the information could not be printed out or otherwise provided in a reliable manner. Additionally, when the Union was informed of the billing method, it revised its requests, seeking only reliable documentation.

> No product ever delivered to Southland Corporation CDC by Earthgrains transport drivers requires payment of any commission. The delivery of products to the Southland CDC is in complete and total compliance with the provisions of section 11(C)(4) and all other provisions regarding CDC deliveries. These deliveries are new business and have never changed in any way since the Southland CDC deliveries began. Since nothing has changed regarding these deliveries. [sic] the Union's position that the deliveries violate section 8 is without merit.
>
> The foregoing information you have requested is irrelevant and unnecessary for the union to perform its statutory and/or contractual duties . . . .

Sawyer replied to the Schuitemaker letter on July 8, expressing his strong disagreement with Respondent's position stated in the July 26, letter. Sawyer asserted the Union never agreed to distribution to Southland by means other than the route sales system, that such distribution with commission had previously been agreed upon and that it is new business is of no consequence because section 17 of the collective-bargaining agreement "requires bakery products 'delivered for resale in retail food outlets [to] be displayed at point of sale by employees covered by this Agreement.' Any exception to this practice must be 'specifically provided for . . . in this Agreement.'" Since there is no exception in the agreement to permit transport rather than point of sale delivery, the procedures of section 18 apply.

Sawyer reiterated the Union's claim the actual price charged Southland is needed to determine if the products are actually secondary label items, thus the Union is entitled to the information. If there are no invoices, then, Sawyer noted, there must be some other written proof of the prices Southland is being charged for the products sold by Respondent. It was not until July that Respondent raised the issue of confidentiality.

About a week and one-half later, on July 18, Sawyer sent Schuitemaker another letter. The letter reiterates Sawyer's "assurances of confidentiality. . . . The Union has always and does hereby commit to maintaining the agreed upon degree of confidentiality on any information received." Moore replied to Sawyer's letter on August 11 agreeing to meet with Sawyer to resolve their disputes. The meeting was set for August 11. Moore emphasized Respondent's desire to keep "Company confidential information" from its competitors. The meeting was rescheduled to August 27.

During the August 27 meeting,[12] Sawyer informed Respondent:

> That by the company's own admission, the list that I received was not the price that was being charged to Southland Corporation, and further we still needed that information to determine whether a violation was taking place under the collective bargaining agreement regarding a secondary label.

The notes of this meeting demonstrate Sawyer again explained the Union's view of the import of pricing of secondary label products, which was not disputed in the notes. Sawyer informed Respondent's representatives secondary label products are to be offered to all customers at the same price as indicated in the contract. The Union also emphasized its need to protect the route sales representative system. The Union requested the price information to insure Respondent is complying with the collective-bargaining agreement. Sawyer asserted the Company's claim the information was confidential was bogus and again pledged to keep the information confidential. Moore reiterated Respondent's position that it did not have to provide the information. Moore did not explicate why Respondent adopted that position, there was no clear and explicit claim of an unmet need for confidentiality and no alternatives were offered.

Moore sent another letter to Sawyer on September 8 referencing telephone conversations between them attempting to resolve the dispute concerning the requested pricing information. Moore proposed "that this confidential pricing information be provided to a third-party neutral mutually selected by the parties. He/she shall than decide whether section 11(c) applies." There was no other suggestion of accommodation in the letter. Moore claims he offered other accommodations during telephone conversations with Sawyer such as a surety bond or confidentiality agreement as well as a third party reviewing the information. I believe Sawyer's denial Moore made such offers of accommodation. Moore's letter offers only a form of arbitration, which would not be an available remedy if the Union is correct in its interpretation of the collective-bargaining agreement.

Moreover, Moore never clearly explained his failure to mention the surety bond or confidentiality agreement in his letter. Schuitemaker and Moore both admitted Sawyer offered to keep the requested information confidential, thus any claim he refused to enter into a confidentiality agreement if offered appears unlikely. In fact, when such agreement was mentioned in the course of this proceeding, Sawyer readily agreed to it. Sawyer exhibited better recall than Moore and his testimony has been found to be more credible.

My determination Moore did not offer Sawyer a confidentiality agreement is buttressed by Moore's following testimony:

> Casey [Sawyer] had received my September 8, 1997 letter and that was the purpose for the call. And he acknowledged receipt of it and said, "George, we've killed enough trees over this issue, and our position remains unchanged. The *alternative* that you suggested is not acceptable. We view we're entitled to the information and if the company's position is you're not going to provide it, then we'll have to proceed accordingly with unfair labor practices or any and all other means available to us."
>
> My reply was, "Well, Casey, our position is as stated in the letter, that is, *the alternative* that we view is acceptable, and if that's unacceptable to you, then you have to proceed based on what you believe is correct." [Emphasis added.]

In this testimony, Moore admits to offering Sawyer only one alternative. Thus, I find Respondent did not offer a surety bond or confidentiality agreement as an accommodation to the Union as a means of meeting its concerns the information be kept confidential. Schuitemaker and Moore admitted Sawyer offered to keep the information confidential and it is unlikely he would have refused any offered reasonable confidentiality agreement as a condition precedent to the provision of the information. Neither Schuitemaker nor Moore directly refuted Sawyer's testimony they told him their lawyer said they did not have to provide the information as the only initial ground for refusal and only later was a claim of confidentiality made which was met with an offer by the Union to keep the informa-

[12] In addition to Sawyer, Dennis Davis and Gil Olivera were present for the Union and Schuitemaker, Moore, and Hearn were present for Respondent.

tion confidential. Moore admitted he never submitted a written confidentiality agreement to the Union, claiming it was because Sawyer rejected it yet failed to explain why he put the submission of the dispute to a third party in writing since he admitted Sawyer had previously rejected this proposal. These inconsistent statements provide another basis to discredit Moore's testimony.

On September 11, Sawyer wrote another letter to Moore, emphasizing the Union's position the dispute is under section 18 of the collective-bargaining agreement, not section 11(C)(4). Sawyer characterized section 11(C)(4) as irrelevant. The information is necessary to determine if there has been a violation of section 18, and the Union refuses to give up its rights under section 18, which submission to a third party would entail. If the pricing information was supplied, the Union could "reach a final position" concerning whether article 18 has been violated by Respondent. Sawyer closed the letter by repeating his assurance the Union would keep the pricing information as sensitive and "absolutely confidential."[13]

Respondent did not clearly dispute Sawyer's testimony that,

> Any pricing information in the past that we requested, whether it was for route sales purposes in price table one, or whether it was for a bid, government bids, or whether it was for price adjustments, deals the company cut with a certain store to sell product at a lower price. Anytime we needed that information it was available to us.

Sawyer admitted this was the first time he knew of the Union requesting information concerning pricing of products delivered to a CDC; that this was the first time any signatory to a collective-bargaining agreement with the Union distributed secondary label products to a CDC. Schuitemaker admits Respondent readibly provided the union requested price information in the past but claims it always dealt with temporary price reductions and since the route sales representatives are paid commissions based on price table one, Respondent has complied with these Union requests. Schuitemaker did not fully explain why such information is less confidential or less proprietary than the information concerning the products sold to Southland. Moreover, neither of Respondent's witnesses refuted Sawyer's claim it supplied government contract rates. There is no claim this information is less confidential or proprietary. There is no claim the Union did not keep such pricing information confidential.

I find Respondent understood the Union was requesting the pricing information to determine if it was in compliance with the collective-bargaining agreement. Respondent understood the Union was committing to keep the requested information confidential. I also find Respondent understood Sawyer rejected the third party resolution proposal because the Union understood agreeing to such a proposal would constitute a waiver of their rights under section 18 of the collective-bargaining agreement. I credit Sawyer's testimony Respondent never asked the Union to sign a confidentiality agreement and by its own admission, it never submitted such an agreement to the Union. I also credit Sawyer's testimony, for the previously stated reasons, that Respondent never mentioned a surety bond as a means of meeting its confidentiality concerns.

[13] Respondent claimed it did not receive a copy of this letter. I find Sawyer's testimony he both sent the letter by certified mail and fax to be persuasive.

The Union did not dispute Respondent's claim the requested price information is confidential and proprietary, rather, in recognition of this claim, Sawyer offered to keep the information confidential and claimed, without dispute, the Union routinely and historically kept such information confidential. While Schuitemaker and Moore disputed Sawyer's claim price is one of the criteria of secondary label products, they did not indicate they participated in any negotiations where a different definition was given and admitted they did not dispute Sawyer's and Bottali's definitions during negotiations for the current collective-bargaining agreement. Moore and Schuitemaker only disputed the low price criterion portion of Sawyer's definition, they admitted the remainder of his definition was correct. Respondent failed to explain why the Union would agree to lower commissions on secondary label products if pricing for competitive purposes was not a criterion. Inherent probabilities support Sawyer's testimony, specifically his definition of secondary label including a universally offered lower price.

Respondent stopped delivering the Betsy Ross label to Southland CDC about 8 weeks before the instant trial. The reason for this change was not presented on the record, but the cessation is a basis for Respondent requesting a finding the issue is moot. I find the issue is not mute. Sawyer indicated some deliveries of Betsy Ross products are still being made to some 7–11 stores. Moreover, there may be monetary considerations for driver salesmen if it is determined Respondent violated the collective-bargaining agreement. Respondent admittedly is supplying Southland with another secondary label product, Natural Hearth.

III. DISCUSSION AND CONCLUSIONS

It is unquestioned Respondent failed to provide the Union the requested price information. The Union requested information concerning the terms and conditions of employment of the employees, should they be getting commissions i.e. on at least some of the items delivered to Southland or be paid as transport drivers. These are individuals employed within the bargaining unit the Union represents thus, that information is "presumptively relevant" to the Union's proper performance of its collective-bargaining duties. The basis for the presumption is this information is at the core of the employee-employer relationship," *Communications Local 13 v. NLRB*, 598 F.2d 267, 271 fn. 5 (D.C. Cir. 1979), and is relevant by its "very nature." *Emeryville Research Center v. NLRB*, 441 F.2d 880, 887 (9th Cir. 1971). Respondent has not clearly and convincingly rebutted this presumption of relevance.

> The Board uses a broad, discovery-type standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

As noted in *GTE California*, 324 NLRB 424, 426 (1997):

> An employer has a statutory obligation to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative, including its responsibilities regarding processing grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).
>
> A union's interest in relevant and necessary information, however, does not always predominate over other le-

> gitimate interests. As the Supreme Court explained in *[Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979)] "a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." Thus, in dealing with union requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer. See e.g. *Exxon Co. USA*, 321 NLRB 896 (1996); *Good Life Beverage Co.*, 312 NLRB 1060 (1993); *Pennsylvania Power & Light Co.*, [301 NLRB 1104 (1991)]; *Howard University*, 290 NLRB 1006 (1988).

I find Respondent's claim the requested information does not meet the test of relevance unconvincing. Assuming the information is not presumptively relevant, the requests meet the broad standard of relevance and are sufficiently important or necessary to invite the statutory obligation of Respondent to comply with the request. *Postal Service*, 307 NLRB 429 (1992); *Columbus Products Co.*, 259 NLRB 220 (1981). The Union was seeking to determine if, in its view, Respondent was violating the terms of the collective-bargaining agreement. The Union's evidence amply demonstrated the probable and potential relevance of the requested information in fulfilling its statutory representative duties. It specifically requested the information to effectively administer and monitor important contractual rights. The record clearly demonstrates the Union had a reasonable and objective basis for its concern the collective-bargaining agreement was being breached.

The Union's view of the import of price to secondary label products under the collective-bargaining agreement was confirmed by Respondent's silence during the multiple times the Union stated its definition of secondary label included price during collective bargaining. *Waste Stream Management,* 315 NLRB 1088 (1994). Respondent's failure to protest or indicate its disagreement with the Union's position until well after the request for the price information both during and after negotiations, reflects concurrence with the Union's position. Under these circumstances, the silence maintained by Respondent, lends reasonableness to the Union's request.

Respondent fails to convincingly explain its protracted silence regarding the definition of secondary label, nor its willingness to sign the collective-bargaining agreement with the term secondary label if it disagreed with the Union's definition. Respondent's actions indicate an intent to be bound by the Union's expressed definition. Respondent gave clear signals it agreed with the Union's definition. Thus, even though the collective-bargaining agreement does not include the definition for secondary label products, Respondent had for some years provided the Union with price information similar to the information sought herein, which is another manifestation of assent, and adds to the reasonableness of the Union's requests. *Norris Industries*, 231 NLRB 50 (1977). As noted in *Norris*,

> In a comparable collective-bargaining context, silence, whether chargeable to negligence or bottomed upon some purely subjective misconception—has been found sufficient to signify consent. *Machinists Automotive Trades District Lodge No. 190 of Northern California et al. (Peterbilt Motors Company*, 227 NLRB 486 (1976).

I conclude the burden of establishing the relevance of the requested information has been met. The information related to wages and commissions. However, even if the request was not presumptively relevant, the Union presented an objective factual basis for believing Respondent may have been in violation of the collective-bargaining agreement, thus demonstrating a nexus to a collective-bargaining responsibility of the Union, contract enforcement. *Maben Energy Corp.*, 295 NLRB 149 (1989). The Union related the requests for the pricing information during various conversations and in correspondence in terms the Respondent clearly understood. While Respondent had no invoices, the Union acknowledged this form of information was not the only manner Respondent had, to meet the request for written documentation to establish the wholesale price charged Southland. Respondent never sought clarification of the information requested; rather it asserted its lawyer said it did not have to provide the information and later, claimed confidentiality. The information requested clearly was relevant to the determination of whether Respondent was distributing secondary label products consonant with the terms of the collective-bargaining agreement.

Respondent had an affirmative duty to request clarification if it did not understand the Union's entreaties. As the Board held in *National Electrical Contractors Assn., Birmingham Chapter*, 313 NLRB 770, 771 (1994): "[i]t is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." *Keauhou Beach Hotel*, 298 NLRB 702 (1990).[14]

Respondent's claim this matter should be deferred to arbitration is without merit. As Counsel for General Counsel noted, deferral of a charge to arbitration is not appropriate where, as here, the dispute resolution may be dependent on the requested information, raising the specter of a two-stage proceeding, one to decide the definition of secondary label, and then to determine the Union's entitlement to confidential information, and the question of whether section 18 of the collective-bargaining agreement had been violated. "The Board . . . has generally refused to defer issues that would result in a two-tiered system requiring a union to file a grievance to obtain information potentially relevant to its processing of a second underlying grievance." *American National Can Co.*, 293 NLRB 901, 903 (1989). Cf. *General Dynamics Corp.*, 268 NLRB 1432 fn. 2 (1984).

The Board ruled in *Postal Service*, 302 NLRB 918 (1991), "that issues concerning a refusal to supply information are not subject to deferral to the grievance-arbitration process." citing *Postal Service*, 280 NLRB 685 fn. 2 (1986). See also *Postal Service*, 307 NLRB 429 at 433. Moreover, in this case, because of the terms of the collective-bargaining agreement, quoted above, deferral to arbitration may be contrary to the provisions of the collective-bargaining agreement or require the Union to waive specific rights granted in the contract, such as the economic remedies in section

[14] The Board held in *Keauhou:*

> Moreover, even if the Union's request was ambiguous and/or intended to include information regarding nonunit employees when made, this would not excuse the Respondent's blanket refusal to comply. It is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information. See, e.g., *A-Plus Roofing*, 295 NLRB 967, JD fn. 7 (1989); *Barnard Engineering Co.*, 282 NLRB 617, 621 (1987); and *Colgate-Palmolive, Co.*, 261 NLRB 90, 92 fn. 12 (1982).

18. Section 18 specifically excludes the grievance procedure as a means of resolving disputes arising thereunder.

Respondent also claims the information sought is confidential and proprietary and argues giving the Union the information would jeopardize its competitive position. As found above, price of secondary label products has a "probable or potential relevance" in determining whether Respondent's distribution to Southland was in violation of section 18 of the collective-bargaining agreement, meeting the liberal, discovery-type standard imposed by the Court. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435 (1967). See also *Exon Co.*, 321 NLRB 896 (1996). The Union's need for the information was clearly explained to Respondent. Respondent never requested clarification of any of the multiple requests for the price information.[15] The Union was not shown to have any other means of determining whether Respondent was in compliance with section 18 of the collective-bargaining agreement or to otherwise determine if Respondent was indeed distributing secondary label products to Southland or was selling products at premium prices which could constitute a change in the method of distributing a secondary label product.

Next is the issue of whether the Union's legitimate interest in the information predominates over the employer's assertedly confidential and proprietary information in the manner requested. Here, the Union repeatedly offered to keep the information confidential. No protective order was sought by Respondent. Respondent admittedly bargained over which label was properly classified as a secondary label and agreed to change the label it initially proposed to supply Southland because it was not a secondary label. Such recognition indicates Respondent understood the definition of secondary label including price.

Respondent also indicated it understood this as a valid definition by its failure to raise the issue of confidentiality until after its meeting with the Union. Even when it first declined to provide the information, Schuitemaker did not claim confidentiality, only the Respondent's lawyers said they did not have to provide the information. Respondent has failed to convincingly demonstrate the Union's request was predicated on motives other then determining whether Respondent breached the collective-bargaining agreement. As found above, Respondent did not offer to negotiate about alternative means or conditions in meeting the Union's request; other than offering third party resolution, which might constitute a waiver of the union section 18 rights to economic action. Such an offer is not a reasonable accommodation under these circumstances. I conclude Respondent has failed to demonstrate its confidentiality and propriety claims outweigh the Union's need for the information. As noted in *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995):

> The Supreme Court in *NLRB v. Detroit Edison Co.*, 440 U.S. 301 (1979) found that, in certain situations, confidentiality claims may justify a refusal to provide relevant information. In making these determinations the trier of fact must balance the union's need for the information sought against the legitimate and substantial confidentiality interests of the employer. However, it is also well settled that as a part of this balancing process, the party making a claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information.

"The party refusing to supply information on confidentiality grounds has a duty to seek an accommodation." *GTE California, Inc.*, 324 NLRB 424 (1997). The Union has agreed to keep the information confidential. Respondent admittedly had no reason to doubt Sawyer's promise and there was no instance shown where the Union breached a similar pledge. Respondent has provided the Union with price information in the past regarding sale pricing and government contract prices. There was no instance where the Union was shown to have broadcast this information. There is no basis to conclude the Union would breach its promise to meet Respondent's confidentiality concerns. Respondent has also failed to demonstrate why its concerns in this instance are different from those instances where it has provided the Union with confidential price information. The Union has demonstrated its reliability in the past and was not shown to have divulged any price information.

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1) as alleged in the complaint, by failing since March 4, 1997, to furnish the Union with the requested information.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive representative for the purposes of collective bargaining of the employees in the following appropriate unit within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time employees performing work described in and covered by "Section 2. Recognition and Bargaining-Unit Work" of the October 1, 1993 through September 30, 1996 collective-bargaining agreement between the Joint Representative and Respondent (herein called the Agreement); excluding all other employees, guards, and supervisors as defined in the Act.

4. By failing and refusing to furnish the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act, by failing and refusing to furnish the Union with the information requested, information requests which, pursuant to Section 8(a)(5), Respondent was obligated to furnish, I recommend, respondent be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act, including the posting of a notice marked "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

[15] The provision of the price table 1 to the Union was not adequate to permit it to police the contract, for it did not contain the information necessary to determine if the products sold to Southland were sold at a premium rate. Thus, Respondent clearly did not meet the Union's request and there is no colorable claim the information has been supplied.

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, Earthgrains Baking Companies, Inc. Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing or failing to bargain in good faith with the Union by failing to furnish to the Union the requested pricing information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the price information it requested so the Union may determine whether Respondent is complying with the collective-bargaining agreement, and within 30 days from such request, bargain with the Union in good faith for a mutually satisfactory confidentiality agreement, protective order or other procedure that will accommodate the Union's need for the requested information while safeguarding it from unnecessary disclosure, and, if there are no good faith negotiations within this 30-day period, disclose the requested information to the Union without such agreement since the Union has been shown to honor past pledges of confidentiality.

(b) Within 14 days after service by the Regional Director, post at its Northern California offices copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since March 4, 1997.

(c) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Teamsters Union Local No. 490, International Brotherhood of Teamsters, AFL–CIO, by refusing to furnish price information relevant to the Union's processing of grievances or the administration of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with the requested price information so that the Union may determine whether Respondent is complying with the collective-bargaining agreement.

EARTHGRAINS BAKING COMPANIES, INC.

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adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgement of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."